

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

No. 74-1286

**United States Court of Appeals
For the Second Circuit**

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
THE NEWTON - NEW HAVEN COMPANY,
RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR RESPONDENT
AND
SUPPLEMENTAL APPENDIX**

SIDNEY A. COVEN
WARREN D. ATLAS
LEPIE & COVEN

Attorneys for Respondent
10 Tremont Street
Boston, Massachusetts 02108



TABLE OF CONTENTS

	Page
Counterstatement of the Issues Presented for Review	1
Statement of the Case	2
Counterstatement of the Facts	2
Argument	6
I. The Board Abused Its Discretion by Refusing to Set Aside the Election Results Because of the Improper Activities of the Union's Observer	6
II. The Board Abused Its Discretion by Denying the Respondent an Evidentiary Hearing on its Objection	11
III. The Board Is Not Entitled to the Enforcement of Its Order, as Its Decision to Deny a Hearing on the Respondent's Underlying Objection Was Rendered in Violation of the Quorum Requirements Set Out in the Act	13
Conclusion	18
Supplemental Appendix	19

TABLE OF CITATIONS

Cases

<i>Clausen Baking Company</i> , 134 NLRB 111 (1961)	7
<i>General Dynamics Corporation</i> , 181 NLRB 874 (1970)	7, 9, 10, 11
<i>KFC National Management Corporation v. N.L.R.B.</i> , 2nd Cir. (1974), No. 73-1982, May 8, 1974, — F.2d —, 86 LRRM 2271	14, 15
<i>Luminator Division of Gulton Industries v. N.L.R.B.</i> , 5th Cir. (1972), 469 F.2d 1371	11
<i>Milchem Inc.</i> , 170 NLRB 362 (1968)	7, 8, 9

	Page
<i>N.L.R.B. v. Carlton, McLendon Furniture Company</i> , 5th Cir. (1974), 488 F.2d 58	11, 12, 13
<i>N.L.R.B. v. Douglas County</i> , 5th Cir. (1966), 358 F.2d 125	11
<i>N.L.R.B. v. Gooch Packing Company, Inc.</i> , 5th Cir. (1972), 457 F.2d 361	12
<i>N.L.R.B. v. Overland Hauling, Inc.</i> , 5th Cir. (1972), 461 F.2d 944	12
<i>Rebmar, Inc.</i> , 173 NLRB 1434 (1969)	7
<i>Star Expansion Industries Corporation</i> , 170 NLRB 364 (1968)	7, 9
<i>U. S. Rubber Company v. N.L.R.B.</i> , 5th Cir. (1967), 373 F.2d 602	11, 12
<i>U. S. v. Tucker Truck Lines</i> , 344 U.S. 33 (1952)	15, 16, 17, 18

Statute

National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.)	2
Section 3(b)	14
Section 8(a)(1)	2
Section 8(a)(5)	2
Section 10(e)	14, 15

United States Court of Appeals For the Second Circuit

Case No. 74-1286

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

THE NEWTON - NEW HAVEN COMPANY,
RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT
AND
SUPPLEMENTAL APPENDIX

COUNTERSTATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board, herein referred to as the Board, abused its discretion by failing to set aside election results tainted by the improper activities of the Union's Observer during the course of said election.
2. Whether the Board abused its discretion by failing to

order an evidentiary hearing on the Respondent's Objection to the election.

3. Whether the Board's Decision on the Respondent's Request for Review of the Regional Director's dismissal of the Respondent's Objection to the Election herein was invalid because it was rendered in violation of the quorum requirements of the National Labor Relations Act.

STATEMENT OF THE CASE

This case is before the Court upon the petition of the Board for enforcement of its Order issued on December 12, 1973 against the above-named Respondent. The Board's Decision found that the Respondent had committed violations of Section 8 (a) (5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), and its Order directed the Respondent to remedy such violations (A. 11-13).¹

The Respondent resists the enforcement of the Board's Order in toto, contending that the Board's finding of Section 8 (a) (5) and (1) violation was error as a matter of law and that such finding is not supported by substantial evidence on the record as a whole.

COUNTERSTATEMENT OF THE FACTS

The election disputed herein was held on April 13, 1973 among the Respondent's production and maintenance employees at its North Haven, Connecticut facility. The total number of eligible voters was approximately 183; of this total, 87 votes were cast for the Union, 82 against, with 2 ballots being challenged.²

¹ "A." references are to the Petitioner's Appendix herein.

² It is important to note the closeness of the election, and the fact that a shift of two "yes" votes would have made the challenged ballots determinative.

When the Regional Director overruled the Company's five timely objections to the election's conduct (A. 26-27, 28-35), the Employer filed an exception with the Board seeking review of the ruling on its fourth objection (A. 39-43), alleging that an official Union Observer engaged in prohibited conversations and improper electioneering during the election hours while in the course of his official duties (A. 26, 29). On June 11, 1973, the Board, by telegraphic communication, denied the request for review as raising no substantial issue warranting review (A. 44). This denial of the Company's Request for Review, by the Board's admission, was rendered by a panel composed of only one Board Member and two staff assistants, in violation of the quorum requirements of the Act (S.A. 24-26).³

The election was conducted in the Company cafeteria between the hours of 2:00 p.m. and 4:30 p.m. in the afternoon, and between 10:00 p.m. and 11:15 p.m. in the evening. To facilitate voting in accordance with a pre-determined schedule, the Board Agent instructed both the Company and the Union to each designate one Election Observer whose function would be exclusively to notify the appropriate foremen when to release their employees to the polls. The Union Observer so selected was Juan Vega.

Pursuant to the Board Agent's directive, both Vega and the Company Observer were issued official Board badges to be worn conspicuously throughout the election day, while simultaneously being instructed to refrain from any conversation with any employee, apart from the appropriate departmental foremen. These were not requests, but instructions making it explicitly clear that the only form of communication sanctioned or tolerated by the Board would be the announcement to the foremen that their employees' voting time had arrived.

³ "S.A." references are to the Respondent's Supplemental Appendix herein.

The Respondent has submitted testimony, supported by affidavits sworn before the Regional Office representative assigned to investigate the Company's Objections, which show that on three separate occasions during the afternoon voting session Vega left the company of the Employer's Observer to wander unaccompanied through the die casting department (S.A. 19-23). During the course of these suspect wanderings Vega did, in fact, violate his instructions by engaging an undetermined number of employees, most of whom had not yet exercised their vote, in clandestine conversation, either out of the sight and hearing of the Company Observer and foremen, or in Spanish, a language not understood by the Company representatives (S.A. 19-23).⁴

Unfortunately, the Respondent is unaware of what actually transpired during these improper communications, and, since the Board has refused a full evidentiary hearing, has been unable to determine the nature and extent of any improper electioneering that may have transpired. Despite this lack of concrete knowledge as to the content of the various conversations, it is clear that Vega violated both the Board Agent's instructions and the repeated requests of the foreman and Company Observer to cease engaging in the prohibited activity (S.A. 19-23).

Vega further pursued his inappropriate course of con-

⁴ The first occasion was between 2:00 and 2:30 p.m., and lasted five minutes; the second was at 2:30 p.m., the third at 3:30 p.m., with both of these lasting from one to three minutes. The shift change, with twenty to twenty-five employees on each shift, occurred at 3:00 p.m. Consequently, Vega had the opportunity to improperly influence as many as fifty employees for up to ten minutes (S.A. 19-23).

The Regional Director, however, in his Supplemental Decision and Certification of Representative (A. 32-34), which was affirmed by the Board in its Decision on the Request for Review, made a finding "that the time (Vega) was away from the Employer's Observer, estimated to be from one to three minutes, would preclude him from having any substantial conversations with anyone." The Regional Director did not disclose upon what evidence he had made that finding.

duct during the evening voting hours. As an employee was leaving the cafeteria after voting, Vega engaged him in conversation, resulting in the Board Agent ordering the employee to leave and Vega to cease and desist from engaging in and promoting conduct prejudicial to a fairly administered election. In defiance of the Agent's instructions, Vega and the employee continued their conversation while walking down the corridor. When the employee returned to his work station, Vega remained secreted in the hallway near the power press and machine departments. As Vega was then not in sight, the witness was unable to state whether he participated in any other conversations; but considering his obvious bias, and concerted pattern of misbehavior, it is not unreasonable to assume that he may have seized the opportunity to converse with prospective voters enroute to the polling station. To buttress this hypothesis, it should be noted that upon at least two occasions the Board Agent requested Vega to return to the cafeteria. In a noncompliant fashion, Vega would walk towards the cafeteria, but never arrive; rather, he would wander off again down the hall in the direction of the power press and machine departments. Finally, and only after a direct command of the Board Agent, did Vega return to remain seated in the cafeteria (S.A. 19-23).⁵

⁵ The rhetorical question remains, "What magnetic attraction did the hallway from the power press and machine departments to the official polling station hold for the Union Observer?" Remembering that in the instant election's factual setting the improper influencing of even a few votes would have been determinative, it is apparent that the Board's refusal to fully inquire into and investigate these incidents precluded the determination of the extent the election results were tainted by Vega's prima facie showing of improper, prohibited conduct.

ARGUMENT

It is respectfully submitted that the facts, as discussed above, show that the Board, in refusing to set aside the representation election results, or by failing to direct a full evidentiary hearing on the Respondent's Objection, has abused its discretion. Furthermore, the Board is not entitled to the enforcement of its bargaining order, as its decision to deny a hearing on the Respondent's underlying Objection to the election was rendered in violation of the quorum requirements set out in the Act.

I. THE BOARD ABUSED ITS DISCRETION BY REFUSING TO SET ASIDE THE ELECTION RESULTS BECAUSE OF THE IMPROPER ACTIVITIES OF THE UNION'S OBSERVER.

The Respondent recognizes that the Board has been entrusted by Congress with wide discretion in the conduct of representation elections and is aware that to find an abuse of this discretion, and thereby have the election overturned, it must carry forward a heavy persuasive burden. In the alternative, to be entitled to a hearing, the Respondent acknowledges its responsibility to present specific evidence amounting to a prima facie showing which would warrant setting aside the election results. We intend to show below that, in the context of the particular law and fact situation before this Court, the Respondent did, in fact, carry forward its burden of persuasion, and therefore established that it was entitled to the direction of a new election, or a full evidentiary hearing.

Concomitant with this Congressionally mandated delegation of authority is the Board's obligation to safeguard the election process from conduct inhibiting the fair and free choice of the employees' bargaining representative. The Board has long been conscious of this obligation and

has been "especially zealous in preventing intrusions upon the actual conduct of its elections." *Clausen Baking Company*, 134 NLRB 111, 112 (1961). In response to this obligation the Board has recently enunciated a rule whereby conversations, by a representative or Official Observer of one of the parties, regardless of their content, involving voters, whether waiting to vote, while congregating at the polling station, or while being escorted by Observers to cast their ballots, will, upon proper objection, constitute conduct requiring the setting aside of the election. *Milchem Inc.*, 170 NLRB 362 (1968); *Star Expansion Industries Corp.*, 170 NLRB 364 (1968); *General Dynamics Corp.*, 181 NLRB 874 (1970). As the Board has acknowledged its "responsibility to protect its processes against abuse or undesirable use" and that it "should guard against having its prestige put to . . . possible abuse," *Rebmar Inc.*, 173 NLRB 1434 (1969), one may reasonably interpret the *Milchem* rule as but another step forward toward the realization of theoretically ideal laboratory conditions in the representative election process.

The Board's brief (pg. 7) cites both *Milchem, Inc.* and *General Dynamics Corp.*, with approval for the rule enunciated therein, but attempts to distinguish them from the case at bar on the facts. The Board takes the position that *Milchem* requires an election to be set aside due to "prolonged conversations" and not merely "any chance, isolated, innocuous comment." *General Dynamics*, it maintains, will provide the basis to void an election when the objectionable communications are of a magnitude "clearly beyond those which might normally be engaged in by an observer in fulfilling his observer function." Respondent agrees, and respectfully submits that an analysis of the factual setting and legal theory presented by those cases, and others, will compel the conclusion that the election herein should be set aside, or an evidentiary hearing

ordered to determine whether the original election should be voided as a result of the Union Observer's illegal activities.

A closer look at the facts of *Milchem* reveals that the duration of the "prolonged conversations" was rather limited; in fact, the union official only "stood for several minutes near the line of employees waiting to vote." *Milchem, supra*, at 362. The theory underlying the Board's promulgation of the *Milchem* rule could best be stated simply that "the final minutes before an employee casts his vote should be his own, as free from interference as possible." *Milchem, supra*, at 363.

Obviously this rule should be applied with an informed sense of realism, and the Board therefore referred to the well established "de minimis" doctrine that "we will be guided by the maxim that the law does not concern itself with trifles." *Milchem, supra*, at 363. The Board has anticipated the issue before this Court; that is, "... the sometimes troublesome task of defining . . . trifling." *Milchem, supra*, at 363. In an endeavor to relieve this semantic burden, the Board placed future parties on notice by admonishing them to take "pains to assure complete compliance with the rule by instructing their agents, . . . simply to refrain from conversing with prospective voters in the polling area . . .," for only then can "the rule assure that the parties will painstakingly avoid casual conversations which could otherwise develop into undesirable electioneering or coercion." *Milchem, supra*, at 363.

The Union Observer here, Juan Vega, acted in flagrant disregard of these admonitions, for a time period longer than the five minutes in *Milchem*, while having the opportunity to influence even more prospective voters. The Respondent urges this Court to apply the Board's rationale in finding that "... we believe that (the Union Official's) conduct could not, in any view of the evidence, be dismissed

as minimal." *Milchem, supra*, at 363. The Respondent further contends that the Board should have arrived at an analogous conclusion in the instant case, resulting in an Order that the election results be voided, or that a full evidentiary hearing on the Objection be held.

In a companion case to *Milchem*, decided on the same day, the Board extended its rule to include improper electioneering conduct in the vicinity of the polling station. In that case the Union Agent engaged in electioneering in "close proximity to the polls during a substantial part of the voting period, notwithstanding the Board Agent's instructions, on three separate occasions, that he leave the area..."⁶ The Board found that "...such conduct by one acting as an agent for a party (was) a serious breach of our rule against electioneering at or near the polls, and in the circumstances, sufficient to warrant the inference that it interfered with the free choice of the voters. Accordingly, we shall set aside the election and direct that a new election be conducted." *Star Expansion Industries Corporation*, 170 NLRB 364, 365 (1968). The factual circumstances surrounding the election herein parallel those in *Star Expansion Industries*, and, therefore, we believe that the Board should have ordered a like remedy.

Milchem and *Star Expansion Industries* focus their attention on improper electioneering at or near the polls; consequently, their holdings are applicable to Vega's improper conduct during the evening voting session. A more recent case, *General Dynamics Corporation*, 181 NLRB 874 (1970), addresses itself to Observer conduct away from

⁶ The polling station and lines of waiting voters were located inside the plant cafeteria. The Union Agent stood near the cafeteria's entrance, was twice warned by the Board Agent, and then left to stand and speak with employees approximately fifteen feet down the corridor.

the polling area;⁷ and therefore, relates more precisely to Vega's alleged illegal electioneering in the plant's production areas during the afternoon session.

In *General Dynamics* the Board agreed "with the Hearing Officer that (the Union Observer's) conversations with employees he escorted to the polling place . . . do not constitute a basis for setting aside the election, (however) we reach this conclusion for different reasons than the Hearing Officer . . . In so deciding (*Milchem*) we did not intend to exclude as a basis for setting aside an election, conversations engaged in by union or management observers . . . However, in this case (the union observer found to be engaged in illegal electioneering) was the observer for the losing petitioner . . . and under a well established legal principle we will not permit a wrongdoer to profit by the illegal act of its agent." *General Dynamics Corporation, supra*, at 875.

The conduct complained of in *General Dynamics Corporation* approximates the conduct complained of during the afternoon voting session at the Respondent's plant, with an important distinction. In the case now before this Court, the Respondent has committed no illegal act and therefore is the appropriate party for redress because of the illegal acts of the Union's Observer.

The Board in *General Dynamics* further stated that even if all the tainted votes, plus those votes cast against both unions, were counted, the successful union's vote tally would still be in the majority, so that no substantial detriment to the employer could be found in the Board's refusal to direct a new election. In the instant case, two votes could have been determinative, could have been affected by Vega's conduct, and therefore the concluding

⁷ In *General Dynamics*, the Union Observer, while escorting employees to the polls, separated himself from the Employer's and rival Union's Observers, and then engaged in improper campaigning.

language of the Board, that the Observer's "activities did not affect the outcome of the election and do not warrant setting the election aside," *General Dynamics Corporation, supra*, at 875, would be inapplicable to the case at bar because the illegal activities here most certainly could have affected the election's outcome. In short, in a fact situation similar to that presented before this Court, the Board would have voided the election result but for an arithmetical impossibility of detriment to the employer.

For a court to set aside the election results, a material effect upon the outcome, resulting from the alleged misconduct, must be shown. The Respondent argues that Vega's illegal activities provide the requisite factual basis for the finding of such a material effect; but if this Court finds that "... the objecting party (Respondent) is not entitled to have the election set aside, he may still have a right to a full adversary hearing." *N.L.R.B. v. Carlton, McLendon Furniture Company*, 5th Cir. (1974), 488 F. 2d 58, 61. And furthermore, "... (T)he determination of whether the Company has raised a substantial and material factual issue is a question of law and ultimately a question for the courts." *Luminator Division of Gulton Industries v. N.L.R.B.*, 5th Cir. (1972), 469 F. 2d 1371, 1374.

II. THE BOARD ABUSED ITS DISCRETION BY DENYING THE RESPONDENT AN EVIDENTIARY HEARING ON ITS OBJECTION.

To secure a hearing the objecting party must present a prima facie case warranting setting aside the election. *U.S. Rubber Company v. N.L.R.B.*, 5th Cir. (1967), 373 F. 2d 602, 606. This criterion is fulfilled by providing "... specific evidence of specific events from or about specific people . . ." (S.A. 19-23) in support of allegations sufficient in law to overturn the election. *N.L.R.B. v. Douglas County*, 5th Cir. (1966), 358 F.2d 125, 130. For

the evidence to be specific enough it may not be "nebulous and declamatory assertions, wholly unspecified, nor equivocal hearsay." *U. S. Rubber, supra*, at 606.

In the *Carlton, McLendon* case,⁸ the Fifth Circuit found "that the present record is not conclusive as to the impact . . . , that a substantial and material factual issue as to impact exists, and that the Company has presented a prima facie case with sufficient specificity to warrant a full adversary hearing." *N.L.R.B. v. Carlton, McLendon, supra*, at 61-62.

In explanation of its holding, the Court relied heavily on the fact that the election results were very close. To this effect the Fifth Circuit cited with approval the reasoning set down in two of its previously decided cases, *N.L.R.B. v. Overland Hauling, Inc.*, 5th Cir. (1972), 461 F. 2d 944, and *N.L.R.B. v. Gooch Packing Company, Inc.*, 5th Cir., (1972), 457 F. 2d 361.

"In deed we attach some importance to the fact that a change of three votes would have changed the outcome of the election. We have noted before that in close elections, 'any minor violation of the Act cannot be dismissed summarily for it could have swayed the crucial vote.'" *N.L.R.B. v. Carlton, McLendon, supra*, at 64; quoting *N.L.R.B. v. Overland Hauling, supra*, at 946. Furthermore, ". . . in close . . . election situations the Board is required to particularly and carefully scrutinize charges which in other cases would constitute immaterial or insubstantial objections to the election, and when the existence of hard evidence of irregularities is supplied, a full hearing to get at the truth should be accorded." *N.L.R.B. v. Carlton, McLendon, supra*, at 64; quoting *N.L.R.B. v. Gooch Packing, supra*, at 362.

⁸ The conduct complained of by the Company was the election eve distribution of a handbill misrepresenting election results at another company, and prejudicial Union Observer conduct in challenging four eligible voters' qualifications in the presence of six other employees.

In the situation presented before this Court neither the Respondent nor the Board can be certain how Vega's repeated, deliberate disregard of the Board Agent's instructions actually affected the election result. Who can determine the number of prospective voters prejudiced by conversation resulting from Vega's unaccompanied meanderings through the die casting department or the hallway near the power press and machine departments, while identified by badge as an official representative of the National Labor Relations Board? The Respondent urges the Court to note the concluding language of its sister circuit in *N.L.R.B. v. Carlton, McLendon*, compare it with the facts presented here, and decide, in a like fashion, that "the evidence here is not so conclusive, (as) substantial and material factual issues (relating) to the impact of Union conduct still exist. (Therefore, in order to be) consistent with what we (Fifth Circuit) have said, the Board should conduct a full hearing in order to determine the extent to which the challenged conduct affected the results of the election." *N.L.R.B. v. Carlton, McLendon*, *supra*, at 64.

Furthermore, the record reveals that the Regional Director made findings of fact (A. 32-34), contrary to the testimony contained in the witnesses' affidavits (S.A.19-23), without disclosing the basis upon which he rests such findings (see footnote 4). It is the Respondents' contention that these factual discrepancies should be properly resolved in a full adversary hearing conducted under oath.

III. THE BOARD IS NOT ENTITLED TO THE ENFORCEMENT OF ITS ORDER, AS ITS DECISION TO DENY A HEARING ON THE RESPONDENT'S UNDERLYING OBJECTION WAS RENDERED IN VIOLATION OF THE QUORUM REQUIREMENTS SET OUT IN THE ACT.

By its own admission, the Board rejected the Respondent's Request for Review of the Regional Director's dismissal of Respondent's Objection to the election herein in the same fashion as in *KFC National Management Corporation v. N.L.R.B.*, 2nd Cir. (1974), No. 73-1982, May 8, 1974, — F. 2d —, 86 LRRM 2271; that is, by a panel composed of only one Board Member and two staff assistants, thus, in violation of Section 3 (b) of the Act (S.A. 25-26).

When the Respondent requested the Board to petition this Court to remand the case for proper reconsideration pursuant to Section 3 (b) of the Act, the Board refused such request, taking the position that there were no "extraordinary circumstances" within the meaning of Section 10 (e) of the Act, and therefore the Respondent was precluded from raising the invalidity of the Board's procedure (S.A. 27). The Respondent takes exception to the Board's theory, and will endeavor to show below those "extraordinary circumstances" in which it finds justification for this Court to remand the case to the Board in accordance with its *KFC National Management* decision.

The Board's argument follows well settled Administrative Law principle, namely that the Respondent's failure to object at the agency level bars this Court's consideration of the objection. It is submitted that this argument must fail here owing to the extraordinary factual circumstances. Simply stated, the failure of the Respondent to make timely objection before the Board was occasioned by the Board's failure to make public the fact that it was operating under a procedure which this Court subsequently found to be illegal. In short, the Respondent could not object to a practice of which it was unaware, and this lack of awareness owes directly to the Board's longstanding practice of concealment.

The shroud surrounding the Board's illegal pro-

cedure is evidenced by the fact that no official Board publication mentions, refers to, or describes the complained of practice. This clandestine attitude is also clearly exhibited by the Board's attempt to "cover-up" the facts, so that a court order was required in *KFC National Management, supra*, at 86 LRRM 2272-3, to overcome their resistance to divulging the information.

With all due respect to this Court's statement in footnote 4 of its KFC decision (86 LRRM at 2273), the mere reference to this practice made in an obscure publication of the Southwestern Legal Foundation⁹ should not be held as sufficient notice to warrant a finding that the Labor Bar generally became aware of the procedure.¹⁰ If the Board had desired to apprise the Labor Bar of its practice, it could and should have publicized the facts in any number of appropriate ways; for instance, in its Annual Report, Rules and Regulations, or in a published Decision. Instead, its failure to provide access to the information, and its resistance to attempts to uncover the facts make for the requisite showing of "extraordinary circumstances" under Section 10 (e) of the Act.

In *U. S. v. Tucker Truck Lines, Inc.*, U.S. Sup. Ct., 344 US 33 (1952), the Court held that the appellee Company could not, for the first time before the District Court, raise the fact that an Interstate Commerce Commission Examiner had not been appointed pursuant to the Administrative Procedure Act (APA). *Tucker* may be dis-

⁹ Murphy, the National Labor Relations Board — An Appraisal, Proceedings of the Thirteenth Annual Labor Law Institute, Southwestern Legal Foundation, Nov. 2-3, 1967, 113, 132-33 (1968).

¹⁰ Although Respondent's Counsel has been engaged in practicing exclusively in the labor management relations field, particularly before the Board, for more than twenty years, approximately ten of which were spent as a Field Attorney in the Board's Boston office, he had no knowledge prior to May 29, 1974 that the Board had been handling Requests for Review by panels consisting of persons other than Board Members themselves.

tinguished from the case at bar on the fact that, in *Tucker*, the appellee did not offer any excuse, nor did the Court require any, for its failure to raise the objection in the administrative proceeding. Unlike the instant case, there was no claim by the appellee that he was misled or hampered in ascertaining the factual circumstances surrounding the Examiner's appointment.

In conjunction with the fundamental factual differences between the cases, the Respondent would like to call this Court's attention to the persuasive thinking set down in the *Tucker* dissents of Justices Frankfurter and Douglas.

Justice Frankfurter, while agreeing that no prejudice resulted to the appellee, and that unasserted rights may be waived, still found the Supreme Court majority decision to be an example of inscrutable "oriental justice."

"... I find no explicit waiver here, nor is it clear to me how the appellee can be charged with knowledge of the official status of the examiner on the basis of whose report the Commission took action adverse to it. In any event, the requirement of the Administrative Procedure Act . . . is not something personal to a party. It is a requirement designed to assure confidence in the administrative process by defining and limiting the various organs through which that process is allowed to function." *Tucker, supra.* at 39. The Respondent here feels that the quorum requirements of the National Labor Relations Act were designed with the same protection in mind; therefore, they are not personal to the litigants, were not waived, and have not been complied with by the Board.

Justice Frankfurter emphasized, and we agree, that "... we are dealing with legislation which sought to remedy what were believed to be evils in the way in which administrative agencies exercised their authority prior to the enactment of the Administrative Procedure Act." The Justice continued to point out that the A.P.A. "created

unwaivable limitations upon the power of these agencies . . . the limitations upon the power of the (agency) to act, imposed by the command that it must do so only in accordance with the requirements of the Administrative Procedure Act, are thus not within the dispensing power of any litigant. They bind and confine the (agency) itself." *Tucker, supra* at 40. The Respondent respectfully submits that, by analogy, the above reasoning should be applied to the relationship between the illegal Board procedures and the National Labor Relations Act quorum requirements. If this Court accepts this argument it would necessarily follow that the Respondent's failure to object at the agency level will not be a fatal bar to judicial review.

Presumably the argument will be made that to remand this case to the Board for proper reconsideration would open the floodgates to similar remand motions in an astronomical number of representation cases. This, of course, would not be true if the Board had complied with the requirements of the Act, and therefore it is the Board itself that has drawn this administrative burden upon itself. The correct fashion to redress these undesirable circumstances resulting from the agency's unlawful practices would be to petition Congress for a change in the legislation, not to deny a litigant his rights under existing law. In fact, Justice Frankfurter approves of this remedy in his remarks that "situations like this arise from time to time when decisions of this Court in the observance of law suggest corrective legislation." *Tucker, supra* at 40.

Justice Douglas also disagreed with the majority as he found that "(t)his decision gives a capricious twist to the law." *Tucker, supra* at 40. He was convinced that "the failure of a federal agency to use the type of examiner prescribed by Congress . . . vitiated the proceedings whether objection was raised or not." *Tucker, supra* at 40.

Justice Douglas' dissenting opinion also finds the fact

that the appellee was not prejudiced by the result to be irrelevant. He indicates that "the only important consideration for us is that Congress has condemned the practice; and we as supervisors of the federal system should see to it that the law is enforced . . ." *Tucker, supra* at 41. He found that the Commission's action in *Tucker* "created an error that permeates the entire proceeding. It is error that goes to the very vitals of the case. I would therefore set aside the order and sent the case back for a hearing that meets the statutory standards . . ." *Tucker, supra* at 42.

The Respondent here respectfully urges this Court to distinguish *Tucker* from the instant case as this Respondent has offered a reasonable excuse, to both the Board and this Court, for failing to raise its objection at the Agency level. If this Court declines to distinguish the cases, it is then urged to find the reasoning set forth in the dissents by Justices Frankfurter and Douglas persuasive, so that the Respondent is not barred from raising its Objection at this time. A remedy, like that suggested by Justice Douglas in *Tucker*, would be appropriate, and therefore, we feel, the case should be remanded to the Board in accordance with this Court's decision in *KFC National Management Corporation*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's Order should be denied enforcement.

SIDNEY A. COVEN
WARREN D. ATLAS
LEPIE & COVEN

10 Tremont Street
Boston, Massachusetts 02108
Attorneys for Respondent

August 1974

SUPPLEMENTAL APPENDIX

AFFIDAVIT OF CORNELL DOLANA

Now comes Cornell Dolana who deposes and says:

I live at 139 Summit Drive, North Branford, Connecticut. I am foreman of Quality Control, Die Casting. On the day of the election held by the National Labor Relations Board on April 13 at about 2:00 to 2:30 p.m. Juan Vega and Mrs. Gulley came into the Zinc side of the casting department in the area where my employees were working. They had already voted. Mr. Vega went directly to the people working at their machines including the die casters as well as the people who work under me, the quality control inspectors. Mrs. Gulley was standing by the door of the die casting office and she could not hear what Vega was saying to the people I saw him talking to. I heard him tell a couple of people who were near me to go to vote. After that he went away from me. I told him not to bother the people because I had already told the people when they should go to vote. After I spoke to him he continued to go around to the people talking to them at their machines but I did not hear what he said to them. He was there for about 5 minutes.

At about 2:30 he came back to the die casting department and he started going to the people where they were working and talked to them. I did not hear what he said to them. Again I told him that I had a schedule as to when people should go to vote and I had already told the people when they should vote. He just continued through the department. Mrs. Gulley remained right by the door of the die casting office.

At about 3:30 Vega and Gulley came back to the die casting department and went into the aluminium side. Mrs. Gulley stayed by the office again. When I saw Vega talking to two employees who were not eligible to vote I told Vega that they were not eligible to vote. He then went

further into the back on the aluminum side and I saw him talking to people at their machines as he went through and then I lost sight of him.

On the first occasion that Vega came into the die casting department the people working under me had already voted but there were other employees in that department who had not voted.

I have read the above statement and it is true to the best of my knowledge and belief.

(s) CORNELL DOLANA

Sworn to and subscribed before me this thirtieth day of April, 1973 here at North Haven Connecticut.

(s) GERALD WOLPER, *Attorney*
NLRB

AFFIDAVIT OF RICHARD ANDREE

Now comes Richard Andree who deposes and says:

I live at 132 Hillside Avenue, New Haven, Conn. I am the foreman of Quality Control at the Newton-New Haven Company. On the day of the NLRB election which was held on April 13 I was in the casting department at about 3:00 p.m. Coming down the center aisle from the press department into the casting department I saw Charlie Horvath, the Production Manager, Mac Rodriguez, the General Foreman of the Finishing department and Cornell Dolana, the other Quality Control Foreman and Virginia Gulley the company runner and Juan Vega, the Union runner. The runners were used to go to the various departments to tell the foreman to release the employees to allow them to vote. Both Vega and Gulley were wearing badges which were grey and white which had the word "Official" on them and the words "National Labor Relations Board". It was a round type pin. As the group approached me I heard Juan Vega and Cornell talking and they were discussing something about getting people to vote or people having voted. As the group came near the

wall of the partition separating the press and casting departments I heard Vega say something in Spanish but I do not know what he said. Then Vega left the group. I asked Virginia Gulley if she spoke Spanish and she said she did not. I said that I did not think Vega should speak Spanish since Virginia did not understand it. I observed Vega walking along the front wall of the casting department and then I saw him turning right at the end of the row of casting machines. I told Virginia that she should be with him and I told her that I would take her down because she appeared hesitant about walking among the machines. I started escorting her down in the general direction of where Vega had gone. About half-way down the wall the other people left in the group called us back. Vega was coming down the center aisle of the casting department and had gone all around the department. When Virginia and I approached the group I observed Vega going into the zinc side of the casting department and Cornell was going after him. Vega was gone for about three minutes I would say and I left the group when I returned with Virginia.

I have read the above statement and it is true to the best of my knowledge and belief.

(s) RICHARD ANDREE

Sworn to and subscribed before me this thirtieth day of April, 1973 here at North Haven Connecticut.

(s) GERALD WOLPER, *Attorney*
NLRB

AFFIDAVIT OF VIRGINIA GULLEY

Now comes Virginia Gulley who deposes and says:

I live at 199 Eastern Street, New Haven, Connecticut. I am a key punch and computer operator in the payroll department for Newton-New Haven Company. I was a runner for the company during the election run by the National Labor Relations Board on Friday, April 13, 1973.

The man from the NLRB, Mr. Bernstein, told myself and Juan Vega, that we were to stay together and just go to the various departments and tell the foreman of the departments that it was time for their employees to vote. Vega was the runner for the Union. Bernstein told us to talk to no one else other than the foremen of the departments. In the afternoon while in the Die Casting Department and in the Power Press Department Vega spoke to an employee in each department while I was standing beside him. He spoke to these employees in Spanish. I told him that he should not talk to them in Spanish because I couldn't understand it. He said that his people could not understand English. I told him he would have to speak in English because I could not understand Spanish and he really was not supposed to be speaking to the people. He just shrugged his shoulders. On one occasion when we were in the die casting department I was talking to one of the foreman and my back was turned and Vega disappeared. The foreman I was speaking with, I think it was Dick Andree offered to walk through the department with me but I said that he would be right back. He came back in a minute or so. I don't remember him going off on his own on other occasions in the die casting department. When he started going I walked along with him or a few steps behind him. Other than the two people I mentioned earlier, when I was with Vega I don't remember him talking to other employees.

When the polls were open at night I was standing at the door of the cafeteria where the voting took place. After one employee voted he started talking to Vega and Mr. Bernstein told him to leave. The employee left and Vega walked down the hall with him and I noticed them talking.

While Vega was talking to this employee he might have been talking to other employees because he was standing in the hall near the power press and machine department. While Vega was down the hall Mr. Bernstein asked him a couple of times to return to the cafeteria. Vega would walk back to the cafeteria and then wander back down the

hall. After two times of this Bernstein came to the door of the cafeteria and told Vega who was down the hall to come back into the cafeteria and sit down which he did.

I have read the above statement and it is true to the best of my knowledge and belief.

(s) VIRGINIA GULLEY

Sworn to and subscribed before me this thirtieth day of April, 1973 here at North Haven Connecticut.

(s) GERALD WOLPER, *Attorney*
NLRB

[Letterhead — LEPIE AND COVEN]

June 4, 1974

John C. Truesdale, Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: N.L.R.B. v. The Newton-New Haven Company
Second Circuit Court of Appeals No. 74-1286
Board Cases No. 1-CA-9227 & 1-RC-12,519

Dear Mr. Truesdale:

The recent decision by the Second Circuit Court of Appeals in *KFC National Management Corporation v. N.L.R.B.* which appeared in the May 27, 1974 issue of the Labor Relations Reporter at 86 LRRM 2271 has brought to my attention the fact that the Board has been following a practice, of which I had no previous knowledge, of handling Requests for Review by a panel consisting of one Board member and two staff attorneys. The Court, as you know, found this practice to be invalid and consequently denied enforcement of the Board decision and remanded the case to the Board for consideration of the Company's request for Board review of the Regional Director's representation decision.

The Request for Review in Case No. 1-RC-12,519 filed by me in behalf of The Newton-New Haven Company was denied by teletype dated June 12, 1973 "By direction of the Board" as raising no substantial issues warranting review, in similar manner to the Board action in the *KFC National Management Corporation* case. It appears reasonable to assume that the Newton-New Haven Request for Review was similarly handled by a panel consisting of only one Board member and two staff attorneys.

I respectfully request that you advise me as soon as possible whether or not the Request for Review was handled by such a panel as well as the extent and date of participa-

tion of any Board members in the consideration of the Request for Review.

In the event that the Request for Review was handled by a panel similar to that in the *KFC National Management Corporation* case, I further request that the Board ask the Court of Appeals to remand the case to the Board for reconsideration and that, on such remand, the Board reconsider the Request for Review in accordance with its rules and regulations.

Very truly yours,
SIDNEY A. COVEN

SAC: hw

cc: Michael A. Wolly, Esquire
Office of the General Counsel
National Labor Relations Board
Washington, D.C. 20570

[Letterhead — NATIONAL LABOR RELATIONS BOARD]

June 14, 1974

Sidney A. Coven, Esq.
Attorneys at Law
Ten Tremont Street
Boston, Massachusetts 02108

Re: *N.L.R.B. v. The Newton-New Haven Co.*
Cases 1-CA-9227, 1-RC-12519

Dear Mr. Coven:

Your letter dated June 4, 1974 inquired as to whether the Request for Review in the above-cited case was handled in a manner similar to that set forth in *KFC National Management Corp. v. N.L.R.B.*, and requested the date and extent of participation of any Board Members.

A review of our records indicates that your Request for Review was handled in a manner similar to that in the *KFC National Management* case. Upon consultation with

the Solicitor of the Board, he has advised me that a Motion for Remand in a similar case * is presently pending before the Second Circuit in which the Employer Respondent has requested the Court to remand the case to the Board upon the grounds you raise here. The Board plans to make the contention to the Court that Sec. 10(e) bars consideration by the Court of any issue not raised before the Board. In connection with our Sec. 10(e) contention, it is noted that the Board's decision in *KFC National Management Corp.*, 204 NLRB No. 69, in which the challenge to the Board's procedures were first made issued on June 29, 1973, and preceded the decision in *Newton-New Haven*, 207 NLRB No. 116, which issued on December 12, 1973. Oral argument is scheduled for June 18, 1974, in the *Westinghouse* case. It is likely that the Court's decision on that Motion may prove dispositive of your request.

Accordingly, you are advised that the Board wishes to hold your request in abeyance pending the Court's determination in *Westinghouse* which poses a similar issue. The Board, therefore, would not oppose any request asking the Court to defer hearing your case or requesting an extension of time pending the Court's decision on the Motion in the *Westinghouse* case.

Sincerely,
(s) JOHN C. TRUESDALE
JOHN C. TRUESDALE
Executive Secretary

* *Westinghouse Broadcasting Co., Inc. v. N.L.R.B.*, Docket No. 74-1319

[Letterhead — NATIONAL LABOR RELATIONS BOARD]

June 21, 1974

Sidney A. Coven, Esq.
Ten Tremont Street
Boston, Massachusetts 02108

Re: *N.L.R.B. v. The Newton-New Haven Co.*
Cases 1-CA-9227, 1-RC-12519

Dear Mr. Coven:

This is in further reference to your letter of June 4, 1974, and my reply of June 14, 1974.

I am advised that on June 18, 1974, the United States Court of Appeals for the Second Circuit, in *Westinghouse Broadcasting Co., Inc. v. N.L.R.B.*, Docket 74-1319, denied the Employer-Respondent's Motion for Remand. You will recall that Westinghouse had requested the Court to remand that case to the Board upon the grounds you raised in the instant case in your letter of June 4, and that we opposed the motion on Section 10(e) grounds.

Section 10(e) of the National Labor Relations Act, as amended, provides, in part, that

No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

Finding no extraordinary circumstances, the Board has instructed me to advise you that your request that the Board ask the Court to remand the instant case to the Board for reconsideration should be, and it hereby is, denied.

Sincerely,

(s) JOHN C. TRUESDALE

JOHN C. TRUESDALE

Executive Secretary

Blanchard Press, Inc.

Law Printers

Telephone 426-C690

23 Beach Street, Boston, Massachusetts 02111

Everything from a text book to a business card

PROOF OF SERVICE

August 26, 1974

A. Daniel Fusaro, Esq., Clerk
United States Court of Appeals
for the Second Circuit
Court House
Foley Square
New York, N. Y.

Dear Sir:

Herewith are twenty-five copies of the Brief for Respondent and Supplemental Appendix in No. 74-1286,

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

V

THE NEWTON-NEW HAVEN COMPANY,
Respondent.

We certify that we have made service on opposing counsel by depositing two copies of said document in the post office with air mail postage prepaid, addressed as follows:

Office of Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D. C.

Respectfully,

BLANCHARD PRESS, INC.

By: 

John A. Sutherland, Treasurer

Duplicate copy of this Proof
of Service to:
Warren Atlas, Esq.
Lepie and Coven
10 Tremont Street
Boston, Massachusetts

